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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MYRAH MARTINEZ, et al., Plaintiffs, vs. COUNTY OF SONOMA, et al., Defendants.	Case No. 3:15-cv-01953-JST (LB) **PLAINTIFFS' NOTICE OF MOTION AND MOTION TO STRIKE AFFIRMATIVE DEFENSES FROM DEFENDANTS' JOINT ANSWER; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT; [PROPOSED] ORDER** DATE: March 17, 2016 TIME: 2:00 p.m. COURTROOM: 9 (19th Floor) JUDGE: Hon. Jon S. Tigar

PLEASE TAKE NOTICE that, pursuant to Federal Rules of Civil Procedure 8(b) and 12(f)(2), and the Northern District of California's Civil Local Rule 7, on March 17, 2016, at 2:00 p.m., in Courtroom 9 (19th floor) of the Phillip Burton Federal Courthouse located at 450 Golden Gate Avenue, San Francisco, California 94102, before the Honorable District Judge Jon S. Tigar, Plaintiffs Myrah Martinez, Kitara McCray, Madison Marlene Marvel, and R.M. will and do move this Court for an order striking the improperly asserted and deficiently pled affirmative defenses contained in Defendants County of Sonoma, Sonoma County Human Services Department, Jerry Dunn, Sonoma County Family, Youth and Children's Services, Nick Honey, and Stacie Kabour's Joint Answer, ECF No. 57, to the Second Amended Complaint, ECF No. 38.

Plaintiffs Myrah Martinez, Kitara McCray, Madison Marlene Marvel, and R.M.'s instant motion to strike is supported by this notice and motion, the accompanying memorandum of points and authorities, the pleadings on file with the Court in this action, and any other arguments or evidence which may be submitted in this matter.

Dated: February 9, 2016

Respectfully Submitted,

By: ______________________

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I. INTRODUCTION

Plaintiffs Myrah Martinez, Kitara McCray, Madison Marlene Marvel, and R.M. (collectively, "Plaintiffs") move to strike the improperly asserted and insufficiently pled affirmative defenses contained in Defendants County of Sonoma, Sonoma County Human Services Department, Jerry Dunn, Sonoma County Family, Youth and Children's Services, Nick Honey, and Stacie Kabour's (collectively, "Defendants") Joint Answer, ECF No. 57 ("Ans."), to the Second Amended Complaint, ECF No. 36 ("SAC").

II. STATEMENT OF FACTS

On September 30, 2015, Plaintiffs filed the Second Amended Complaint in this action. ECF No. 36.

On January 19, 2016, Defendants filed a Joint Answer to the Second Amended Complaint. ECF No. 57. Defendants' Joint Answer alleged 11 "affirmative defenses," and a "reserve[ation of] the right" to include "additional affirmative defenses." *See* Ans. at 10:1-11:17. These affirmative defenses are the subject of Plaintiffs' instant motion to strike.

III. ARGUMENT

Federal Rule of Civil Procedure 8(b)(1)(A) requires that, when responding to a pleading, a party must state "in short and plain terms its defenses to each claim asserted against it." Federal Rule of Civil Procedure 12(f) authorizes a court to strike from a pleading any "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "'The key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense.'" *Simmons v. Navajo County*, 609 F.3d 1011, 1023 (9th Cir. 2010) (quoting *Wyshak v. City National Bank*, 607 F.2d 824, 827 (9th Cir. 1979)).

"The majority of district courts in this Circuit, including the entire Northern District … , ha[ve] consistently applied [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)] and [*Ashcroft v. Iqbal*, 556 U.S. 662 (2009)] to both claims and affirmative defenses." *Vogel v. Huntington Oaks Delaware Partners, LLC*, 291 F.R.D. 438, 440 (C.D. Cal. 2013); *see*, *e.g.*, *Jacobson v. Persolve, LLC*, 2014 U.S. Dist. LEXIS 115601, **16-17 (N.D. Cal. Aug. 19, 2014) ("this Court has joined the majority of other district courts in applying the heightened pleading standard set forth in *Twombly* and *Iqbal* to affirmative defenses.");

Rodgers v. Claim Jumper Restaurant, LLC, 2014 U.S. Dist. LEXIS 61049, *4 (N.D. Cal. May 1, 2014) ("numerous courts in the Northern District of California have applied the *Iqbal-Twombly* pleading standard to affirmative defenses."); *Hernandez v. Dutch Goose, Inc.*, 2013 U.S. Dist. LEXIS 153707, *7 (N.D. Cal. Oct. 25, 2013) ("there is widespread agreement among courts in this district that the *Iqbal-Twombly* pleading standard for claims for relief also applies to affirmative defenses…").

"'[I]t neither makes sense nor is it fair to require a plaintiff to provide the defendant with enough notice that there is a plausible, factual basis for her claim under one pleading standard and then permit the defendant under another pleading standard simply to suggest that some defense may possibly apply in the case.'" *Warner v. Cellco Partnership*, 2015 U.S. Dist. LEXIS 152522, **34-35 (D. Md. Nov. 9, 2015) (quoting *Palmer v. Oakland Farms, Inc.*, 2010 U.S. Dist. LEXIS 63265, *13 (W.D. Va. June 24, 2010)); *see also Qarbon.com Inc. v. eHelp Corp.*, 315 F. Supp. 2d 1046, 1049 (N.D. Cal. 2004) ("Affirmative defenses are governed by the same pleading standard as complaints."); *Vogel*, 291 F.R.D. at 441 ("Because a defendant bears the burden of proof on its affirmative defense just as a plaintiff does on its claim, *Twombly*'s conception of fair notice would seem to apply equally to both.").

A. EVERY AFFIRMATIVE DEFENSE ASSERTED IS BOILERPLATE PLEADING.

"'Applying the standard for heightened pleading to affirmative defenses serves a valid purpose in requiring at least some valid factual basis for pleading an affirmative defense and not adding it to the case simply upon some conjecture that it may somehow apply,'" and "will also serve to weed out the boilerplate listing of affirmative defenses which is commonplace in most defendants' pleadings where many of the defenses alleged are irrelevant to the claims asserted." *Barnes v. AT&T Pension Benefit Plan*, 718 F. Supp. 2d 1167, 1172 (N.D. Cal. 2010) (quoting *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 650 (D. Kan. 2009)); *see also Hernandez v. County of Monterey*, 306 F.R.D. 279, 284 n. 10 (N.D. Cal. 2015).

Plaintiffs observes that *every* affirmative defense asserted in Defendants' Joint Answer is mere boilerplate, "shotgun" pleading, lacking any supporting allegations specifically tailored to the factual circumstances of this matter. *See* Ans. at 10:1-11:17. "None of the affirmative defenses is supported by facts. Rather, all of the affirmative defenses are legal conclusions and theories, some of which are inapplicable to the asserted legal theories in the complaint." *J & J Sports Productions v. Franco*, 2011

U.S. Dist. LEXIS 25642, *5 (E.D. Cal. Mar. 1, 2011). "[L]abels and conclusions, and a formulaic recitation of the elements . . . will not do." *Hernandez*, 306 F.R.D. at 283. Nor will "wholly conclusory statement[s]" unsupported by "factual matter." *Id.* Accordingly, because the affirmative defenses are deficient on their face, they should all be stricken as "insufficient."

B. EVERY AFFIRMATIVE DEFENSE ASSERTED BY DEFENDANTS IS "INSUFFICIENT" BECAUSE IT FAILS TO IDENTIFY TO WHICH PARTY OR CLAIM THE ASSERTED AFFIRMATIVE DEFENSE IS APPLICABLE.

"'To give fair notice of the defense, . . . a party should identify the claim to which the defense applies.'" *Gates v. District of Columbia*, 825 F. Supp. 2d 168, 170 (D.D.C. 2011). "[A] court must not tolerate shotgun pleading of affirmative defenses, and should strike vague and ambiguous defenses which do not respond to any particular count, allegation or legal basis of a complaint." *Morrison v. Executive Aircraft Refinishing, Inc.*, 434 F. Supp. 2d 1314, 1318 (S.D. Fla. 2005); *see*, *e.g.*, *Beco Dairy Automation, Inc. v. Global Tech Systems, Inc.*, 2015 U.S. Dist. LEXIS 130503, *35 (E.D. Cal. Sept. 28, 2015) (where an affirmative defense "is unclear to which claim [defendant] is referring[,] . . . it is clearly insufficient as a matter of pleading."); *United States Welding, Inc. v. Tecsys, Inc.*, 2015 U.S. Dist. LEXIS 73108, *7 (D. Colo. June 4, 2015) ("These listed defenses do nothing to give [plaintiff] notice of which claim [defendant] intends each defense to be applied."); *Westgate Financial Corp. v. Cotswold Industries, Inc.*, 2009 U.S. Dist. LEXIS 133403, *11 (N.D. Ga. Dec. 30, 2009) ("A review of affirmative defenses asserted by the [] Defendants reveals that they are not specifically related to any particular cause of action…").

Plaintiffs have no idea to which claim or claims alleged in their Second Amended Complaint any "affirmative defense" asserted by Defendants in their Joint Answer applies, because "none of the affirmative defenses respond[] to a particular count of the complaint; rather, the affirmative defenses address[] the complaint as a whole, as if each count was like every other count." *Byrne v. Nezhat*, 261 F.3d 1075, 1129 (11th Cir. 2001). Therefore, every asserted affirmative defense fails to provide "fair notice," because Plaintiffs are left to "gamble on interpreting an insufficient defense in the manner [Defendants] intended." *CTF Development, Inc. v. Penta Hospitality, LLC*, 2009 U.S. Dist. LEXIS 99538, *23 (N.D. Cal. Oct. 26, 2009).

Defendants' failure in this regard is significant because they have filed a Joint Answer that includes both public entity and individual Defendants. Furthermore, the Second Amended Complaint asserts claims based on both federal and state law. Accordingly, the defenses which can be asserted by a particular party will *necessarily* differ based on the Defendant against whom the claim is asserted, and the source of the law asserted. For example, *public entity* Defendants cannot assert qualified immunity—that is a defense applicable solely to *individual* Defendants. *See Owen v. City of Independence*, 445 U.S. 622, 638 (1980); *Roe v. City of San Diego*, 289 F.R.D. 604, 610 (S.D. Cal. 2013). Also, "state law cannot provide immunity from suit for federal civil rights violations." *Wallis v. Spencer*, 202 F.3d 1126, 1144 (9th Cir. 2000). However, no such distinction is drawn in Defendants' Joint Answer. Because Defendants have jointly pled affirmative defenses in a non-specific, "shotgun" manner, Plaintiffs do not know *which* affirmative defenses asserted apply to *which* claim, and, *if* the defenses alleged do apply, *how* they apply. Therefore, every single affirmative defense asserted by Defendants is "insufficient" because each one fails to identify to which party or parties, and to which claim or claims, it is applicable.

C. DEFENDANTS' ASSERTION OF INAPPLICABLE AND INSUFFICIENTLY PLED AFFIRMATIVE DEFENSES MUST BE STRICKEN BECAUSE THEY FAIL TO PROVIDE PLAINTIFFS WITH THE REQUISITE "FAIR NOTICE."

1. First Affirmative Defense: Failure To State A Claim

Defendants' Joint Answer asserts the following affirmative defense: "AS AND FOR A FIRST, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE to the complaint herein, and each claim for relief thereof, defendants allege that the complaint fails to state facts sufficient to constitute any valid claim for relief against any defendant." Ans. at 10:2-4.

This is not an affirmative defense—it is a denial regarding the sufficiency of Plaintiffs' factual allegations.

> [N]umerous courts have determined [that "failure to state a claim"] is not a proper affirmative defense because it is simply an assertion of a defect in the complaint. *See*, *e.g.*, *Powell v. Union Pac. R.R. Co.*, 864 F. Supp. 2d 949, 962 (E.D. Cal. 2012) (striking the affirmative defense where the defendant asserted the plaintiff "failed to allege ... the facts necessary to support his various claims" because failure to state a claim was an improper affirmative defense); *Barnes v. AT&T Pension Benefit Plan*, 718 F. Supp. 2d 1167, 1174 (N.D. Cal. 2010) ("Failure to state a claim is not a proper affirmative defense but, rather, asserts a defect in [the plaintiff's] *prima facie* case"); *Vogel v. Huntington Oaks Del. Partners, LLC*, 291 F.R.D. 438, 442 (C.D. Cal. 2013) ("failure to state a claim is not an affirmative defense; it is a defect in a plaintiff's claim"); *see also Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002) ("that [a] plaintiff has not met its burden of proof as to an element plaintiff is required to prove is not an affirmative defense").

Richmond v. Mission Bank, 2014 U.S. Dist. LEXIS 67920, *13 (E.D. Cal. May 15, 2014).

Furthermore, even if this were a proper defense, "[a] Rule 12(b)(6) motion must be made *before* the responsive pleading." *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 954 (9th Cir. 2004); Fed. R. Civ. P. 12(b) ("A motion asserting [failure to state a claim upon which relief can be granted] must be made before pleading if a responsive pleading is allowed."). Accordingly, "if [Defendants] wished to combat the allegations in the complaint by stating that such allegations were insufficient, [they] should have filed a motion to dismiss." *Comercializadora Recmaq v. Hollywood Auto Mall, LLC*, 2014 U.S. Dist. LEXIS 99692, *49 (S.D. Cal. July 21, 2014).

Therefore, this affirmative defense should be stricken, with prejudice.

2. Second Affirmative Defense: Failure to Mitigate Damages

Defendants' Joint Answer asserts the following affirmative defense: "AS AND FOR A SECOND, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE to the complaint herein, and each claim for relief thereof, defendants allege that should plaintiffs or any of them recover damages against defendants, defendants should be entitled to have the amount reduced or eliminated to the extent that plaintiffs failed to take reasonable steps to mitigate those damages." Ans. at 10:5-9.

Initially, Plaintiffs note that this is a mere *prospective* defense, applicable only "should plaintiffs or any of them recover damages against defendants…" Defenses asserted in an attempt to preempt the occurrence of some other event, such as a finding of liability, are not permitted. *See Lowry v. City of San Diego*, 2012 U.S. Dist. LEXIS 48575, *12 (S.D. Cal. Apr. 5, 2012) (rejecting pleading "to claims which *may* be alleged by Plaintiff"); *Hernandez*, 306 F.R.D. at 289 (rejecting pleading that "seems to try to preempt a not-yet asserted cause of action").

Additionally, this defense merely seeks apportionment of damages prospectively to be recovered by Plaintiffs. "This is not a proper affirmative defense as it does not negate the [Plaintiffs'] cause of action." *Quintana v. Baca*, 233 F.R.D. 562, 566 (C.D. Cal. 2005).

Even if this defense were proper, it is insufficiently pled because it fails to provide Plaintiffs with the requisite "fair notice." "[Defendants'] [Joint] [A]nswer gives no notice to [Plaintiffs] of the basis of [their] alleged failure to mitigate." *Kohler v. Staples the Office Superstore, LLC*, 291 F.R.D. 464, 469 (S.D. Cal. 2013). Failure "to set forth any factual basis in support of [Plaintiffs'] failure to mitigate damages … fail[s] to put [Plaintiffs] on notice of the grounds for that affirmative defense." *Johnson v. Golden Empire Transit District*, 2015 U.S. Dist. LEXIS 45515, *10 (E.D. Cal. Apr. 7, 2015); *see also McCune v. Munirs Co.*, 2013 U.S. Dist. LEXIS 141553, *5 (E.D. Cal. Sept. 27, 2013); *Dodson v. CSK Auto, Inc.*, 2013 U.S. Dist. LEXIS 106817, *6 (E.D. Cal. July 29, 2013); *J & J Sports Productions v. Ramirez Bernal*, 2014 U.S. Dist. LEXIS 67890, *17 (E.D. Cal. May 16, 2014) (striking affirmative defense of "failure to mitigate" because "[m]erely reciting a legal doctrine, without alleging facts supporting the doctrine's application in the case, fails to provide fair notice of the affirmative defense.").

Therefore, this affirmative defense should be stricken, with prejudice.

3. Third Affirmative Defense: "Good Faith"

Defendants' Joint Answer asserts the following affirmative defense: "AS AND FOR A THIRD, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE to the complaint herein, and each claim for relief thereof, defendants allege that at all times mentioned in the Complaint, the actions of the defendants were privileged and/or in good faith under the surrounding circumstances." Ans. at 10:10-13.

This defense is so vague that Plaintiffs have no idea what defense Defendants have asserted. *What* "privilege[s] and/or [] good faith" applies to *what* "surrounding circumstances"? Plaintiffs are left to "gamble on interpreting an insufficient defense in the manner [Defendants] intended." *CTF Development*, 2009 U.S. Dist. LEXIS 99538 at *23. Presumably, the assertion of "good faith" could mean at least one of two different things: (a) Defendants are asserting "good faith" in a manner to avoid punitive damages; or (b) Defendants are asserting "good faith" in a manner to invoke qualified immunity.

To the extent that Defendants are attempting to assert that their actions taken in "good faith" preclude their susceptibility to punitive damages, it is improper. *See J & J Sports Productions v. Catano*, 2012 U.S. Dist. LEXIS 159876, *13 (E.D. Cal. Nov. 6, 2012) ("By alleging they acted with good faith, Defendants seek to negate the intent Plaintiff is required to prove for an award of punitive damages, and this is not a proper affirmative defense."); *see also Dodson*, 2013 U.S. Dist. LEXIS 106817 at **11-12. "Defendants' denial of punitive damages is not an affirmative defense, but rather is an assertion that Plaintiff has not proved essential elements of her claim." *Roe*, 289 F.R.D. at 610; *see also Hiramanek v. Clark*, 2014 U.S. Dist. LEXIS 147584, *6 (N.D. Cal. Oct. 16, 2014); *Comercializadora Recmaq*, 2014 U.S. Dist. LEXIS 99692 at *49; *G & G Closed Circuit Events, LLC v. Nguyen*, 2013 U.S. Dist. LEXIS

81387, *9 (N.D. Cal. June 10, 2013); *EEOC v. United Galaxy, Inc.*, 2011 U.S. Dist. LEXIS 28098, **8-9 (D.N.J. Mar. 17, 2011).

To the extent that Defendants are attempting to assert that their actions taken in "good faith" afford them qualified immunity, as noted above, qualified immunity does not apply to every party, *Owen*, 445 U.S. at 638, nor does it "shield defendants from state law claims," *Johnson v. Bay Area Rapid Transit District*, 724 F.3d 1159, 1171 (9th Cir. 2013).

Therefore, this affirmative defense should be stricken, with prejudice.

4. Fourth Affirmative Defense: Exhaustion of Administrative Remedies

Defendants' Joint Answer asserts the following affirmative defense: "AS AND FOR A FOURTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE to the complaint herein, and each claim for relief thereof, defendants allege that plaintiffs failed to exhaust administrative remedies." Ans. at 10:14-16.

This defense is improperly asserted as to those claims originating in federal law, where this defense is asserted as to "each claim for relief," because there is no exhaustion requirement associated with 42 U.S.C. § 1983. *See*, *e.g.*, *Heck v. Humphrey*, 512 U.S. 477, 480 (1994); *Felder v. Casey*, 487 U.S. 131, 153 (1988); *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 516 (1982) ("exhaustion of state remedies should not be required as a prerequisite to bringing an action pursuant to § 1983"). Therefore, this defense has no application to *any* federal claim.

The exhaustion requirement under state law, the California Government Claims Act ("CGCA"),[1] codified as California Government Code section 810 *et seq.*, is applicable only to Plaintiff R.M., the sole Plaintiff in this action with cognizable state law damages claims. This Court has already held, as a matter of law, that Plaintiff R.M. has *at least* "substantially complied" with the CGCA's requirements. *See* ECF No. 55 at 6:7-7:26. Even if he had not, this Court found that "Defendants have waived any defense regarding the sufficiency of R.M.'s claim because Defendants did not send a notice of insufficiency to R.M." *Id.* at 7:14-16. Therefore, this defense is precluded, as the law of the case.

Therefore, this affirmative defense should be stricken, with prejudice.

[1] "'Government Claims Act' is a more appropriate short title than the traditional 'Tort Claims Act.'" *City of Stockton v. Superior Court (Civic Partners Stockton, LLC)*, 42 Cal. 4th 730, 741-42 (2007).

5. Fifth Affirmative Defense: Statute of Limitations

Defendants' Joint Answer asserts the following affirmative defense: "AS AND FOR A FIFTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE to the complaint herein, and each claim for relief thereof, defendant alleges that the complaint is barred by applicable statute of limitations and/or laches." Ans. at 10:17-19.

In order to state an affirmative defense based on the statute of limitations, "a defendant must identify the claim to which he believes a statute of limitation applies, and allege facts to give a plaintiff fair notice of the defense." *Landmark Equity Fund II, LLC v. Arias*, 2015 U.S. Dist. LEXIS 90197, *14 (E.D. Cal. July 9, 2015). Failure to do so is grounds for striking an affirmative defense based on the statute of limitations. *See*, *e.g.*, *Hamilton v. Quinonez*, 2015 U.S. Dist. LEXIS 33111, *8 (E.D. Cal. Mar. 16, 2015) ("Defendants state no facts suggesting Plaintiff's suit is untimely…"); *Hernandez*, 306 F.R.D. at 285 (affirmative defense "fails to identify which of Plaintiffs' claims, if any, would be barred by the statute of limitations."); *Otey v. CrowdFlower, Inc.*, 2013 U.S. Dist. LEXIS 151846, *14 (N.D. Cal. Oct. 22, 2013) (affirmative defense fails "because it does not identify which claims would be barred by the statutes of limitations mentioned in the defense."). Defendants' assertion of this affirmative defense is unsupported by factual allegations, and fails to identify to which Plaintiff or claim the defense is applicable.

Therefore, this affirmative defense should be stricken.

6. Sixth Affirmative Defense: State Law Statutory Immunities

Defendants' Joint Answer asserts the following affirmative defense: "AS AND FOR A SIXTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE to the complaint herein, and each claim for relief thereof, defendants allege immunity from liability pursuant to the provisions of California Government Code including but not limited to §§ 815 through 840.6, inclusive, §§900 through 945.6, inclusive, and §§950 through 951, inclusive." Ans. at 10:20-23.

This defense is improperly asserted as to those claims originating in federal law, where this defense is asserted as to "each claim for relief," because "state law cannot provide immunity from suit for federal civil rights violations." *Wallis*, 202 F.3d at 1144; *see also Roe v. Gustine Unified School District*, 678 F. Supp. 2d 1008, 1019 (E.D. Cal. 2009); *Buckheit v. Dennis*, 713 F. Supp. 2d 910, 924

(N.D. Cal. 2010). Therefore, this defense has no application to *any* federal claim asserted.

As to the potential applicability of this defense to state law claims asserted, it fails to provide the requisite "fair notice," and is the definition of an impermissible boilerplate, "shotgun" pleading. "[Defendants'] general reference to a series of statutory provisions does not provide plaintiff with fair notice of the basis for this defense." *Advanced Cardiovascular Systems v. Scimed Systems*, 1996 U.S. Dist. LEXIS 11702, **7-8 (N.D. Cal. July 24, 1996). Defendants are required to "specifically identify" *which* provision provides the asserted "immunity from liability" and to state *how* that identified provision "appl[ies] to the facts of the case." *See Hernandez*, 306 F.R.D. at 290 ("The County does not specifically identify any state law that would provide them immunity."); *Devermont v. City of San Diego*, 2013 U.S. Dist. LEXIS 83495, **12-13 (S.D. Cal. June 11, 2013) ("It is not clear to the Court how these [statutory] defenses … apply to the facts of the case . . . [and] the risk of unfair surprise is too great."); *Ariosta v. Fallbrook Union High School District*, 2009 U.S. Dist. LEXIS 48168, *15 (S.D. Cal. June 4, 2009) ("if Defendants intend to assert this [statutory] defense … , they shall include a short and plain statement giving Plaintiffs notice they intend to rely on [its terms]."). Defendants have failed on both fronts.

Additionally, to the extent that Defendants are seeking immunity based on California Government Code sections 815, 820.2, and 820.8, this Court has already determined the inapplicability of those provisions, which is the law of the case. *See* ECF No. 35 at 17:23-19:2.

Therefore, this affirmative defense should be stricken.

7. Seventh Affirmative Defense: *Rooker-Feldman* Doctrine

Defendants' Joint Answer asserts the following affirmative defense: "AS AND FOR A SEVENTH SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE to the complaint herein, and each claim for relief thereof, defendants allege that, to the extent applicable, plaintiffs' actions are barred by the *Rooker-Feldman* doctrine." Ans. at 10:24-26.

This is not an affirmative defense—it is an assertion that this Court does not possess jurisdiction to hear this case. "*Rooker-Feldman* is a jurisdiction-stripping doctrine while collateral estoppel and res judicata are affirmative defenses that have nothing to do with a federal court's jurisdiction." *Contractors' License Board v. Dunbar*, 245 F.3d 1058, 1063 n. 5 (9th Cir. 2001). However, Defendants' Joint Answer expressly "admit[s] the allegations of Paragraph 1" of the Second Amended Complaint, Ans. at 2:9, which alleges that "[t]his Court has jurisdiction over Plaintiffs' claims…" SAC at 2:10-14. Furthermore, this Court has already held, as a matter of law, that it possesses jurisdiction over Plaintiffs' claims. *See* ECF No. 35: 4:17-20 & ECF No. 55 at 5:1-4. Not only is the assertion of this doctrine as an "affirmative defense" improper, but it is expressly wrong, as confirmed by this Court and Defendants' *own pleading*.

Even if this were a proper defense, Defendants have stated no facts in support of this defense constituting the requisite "fair notice." *See Collura v. Ford*, 303 F.R.D. 57, 90 (E.D. Pa. 2014) (where plaintiff had not challenged a state court judgment, "the Court finds the *Rooker-Feldman* doctrine inapplicable."); *Vallecastro v. Tobin*, 2014 U.S. Dist. LEXIS 173604, **19-20 (D. Conn. Dec. 16, 2014).

Therefore, this affirmative defense should be stricken, with prejudice.

8. Eighth Affirmative Defense: Qualified Immunity

Defendants' Joint Answer asserts the following affirmative defense: "AS AND FOR AN EIGHTH SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE to the complaint herein, and each claim for relief thereof, defendants allege that, to the extent applicable, plaintiffs' actions are barred by the doctrine of qualified immunity as to the individually named defendants." Ans. at 10:27-11:2.

If the "Third Affirmative Defense," discussed above, is actually the assertion of qualified immunity, then this defense is merely a redundant assertion of the same defense. "[N]eedless repetition of other averments" in a pleading constitutes "[r]edundant matter" subject to being stricken. *Sliger v. Prospect Mortgage, LLC*, 789 F. Supp. 2d 1212, 1216 (E.D. Cal. 2011). Defendants have already asserted qualified immunity and, therefore, "[t]his defense is redundant and unnecessary." *Roe*, 289 F.R.D. at 610.

This defense is improperly asserted as to those claims originating in state law, where this defense is asserted as to "each claim for relief," because qualified immunity does not "shield defendants from state law claims," *Johnson*, 724 F.3d at 1171, and "even if this [C]ourt were to conclude that [Defendants] were entitled to qualified immunity, the state claims would be unaffected…" *Nelson v. City of Davis*, 685 F.3d 867, 875 n. 2 (9th Cir. 2012).

Furthermore, as noted above, qualified immunity is only available to individual Defendants and not to public entity Defendants. *See Owen*, 445 U.S. at 638; *Roe*, 289 F.R.D. at 610. However, no such distinction is made in the Joint Answer and, presumably, this defense has been asserted improperly on behalf of every Defendant.

Therefore, this affirmative defense should be stricken.

9. Ninth Affirmative Defense: Absolute Immunity of Social Workers

Defendants' Joint Answer asserts the following affirmative defense: "AS AND FOR A NINTH SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE to the complaint herein, and each claim for relief thereof, defendants allege that the actions brought by plaintiff are barred by absolute immunity afforded social workers under state and federal law." Ans. at 11:3-5.

Under federal law, "[a]bsolute immunity is extended to state officials, such as social workers, when they are performing quasi-prosecutorial and quasi-judicial functions." *Tamas v. Department of Social & Health Services*, 630 F.3d 833, 842 (9th Cir. 2010). "[S]ocial workers are not afforded absolute immunity for their investigatory conduct, discretionary decisions or recommendations." *Id.* "[T]o enjoy absolute immunity for a particular action, the official must be performing a duty functionally comparable to one for which officials were rendered immune at common law." *Miller v. Gammie*, 335 F.3d 889, 897 (9th Cir. 2003). Therefore, "the scope of absolute immunity for social workers is extremely narrow." *Id.* at 898. "Once the state assumes wardship of a child, the state owes the child, as part of that person's protected liberty interest, reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child." *Lipscomb v. Simmons*, 962 F.2d 1374, 1379 (9th Cir. 1992); *see also Henry A. v. Willden*, 678 F.3d 991, 1000 (9th Cir. 2012).

Defendants have stated no facts to support the contention that this defense implicates one of the "extremely narrow" circumstances that common law has immunized. In fact, they *cannot* state such facts, "[b]ecause the ongoing requirement that the state supervise [Plaintiffs] and protect [them] from harm while [they] w[ere] in state regulated foster care was not 'intimately related to a judicial proceeding'" and, accordingly, "Defendants are not entitled to absolute immunity [under federal law]." *Thomas v. St. Vincent & Sarah Fisher Center*, 2006 U.S. Dist. LEXIS 58556, *18 (E.D. Mich. Aug. 21, 2006); *see also LaFine v. County of Cook*, 2001 U.S. Dist. LEXIS 25187, *40 (N.D. Ill. May 24, 2001) ("child welfare workers were not entitled to absolute immunity for their role in placing a minor in various dangerous foster care situations.").

Under state law, social workers are absolutely immune from suits alleging the improper investigation of child abuse, removal of a minor from the parental home based upon suspicion of abuse, and the instigation of dependency proceedings. *See Jacqueline T. v. Alameda County Child Protective Services*, 155 Cal. App. 4th 456, 466-67 (2007). However, courts "would be remiss to interpret the case law as supporting the proposition that all actions by social workers involve policy or prosecutorial decisions falling within the scope of statutory immunity." *Id.* at 467 (citing *Scott v. County of Los Angeles*, 27 Cal. App. 4th 125, 141-42 (1994) (social worker could be held liable for negligent supervision of a foster child where she failed to comply with regulations)). "[T]he 'actual delivery of public social services, such as foster care, to abused, neglected or exploited children,' are actions governed by specific statutory or regulatory directives 'which leave the officer no choice,'" and, "[a]s such, they would not be subject to immunity." *Id.*

Defendants have stated no facts entitling them to absolute state immunity for social workers. Again, they *cannot* state such facts, because this *is* a case involving "the 'actual delivery of public social services, such as foster care, to abused, neglected or exploited children,' [which] are actions governed by specific statutory or regulatory directives 'which leave the officer no choice'"—specifically, California Welfare and Institutions Code section 16001.9— and, "[a]s such, they would not be subject to immunity." *Jacqueline T.*, 155 Cal. App. 4th at 466-67; *Scott*, 27 Cal. App. 4th at 141-42.

Therefore, this affirmative defense should be stricken, with prejudice.

10. Tenth Affirmative Defense: No Private Right of Action

Defendants' Joint Answer asserts the following affirmative defense: "AS AND FOR A TENTH SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE to the complaint herein, and each claim for relief thereof, defendants allege that Welfare & Institutions Code Section 16002 provides no private right of action and creates no mandatory duty and consequently, plaintiffs' state law claims fail to allege facts sufficient to constitute a cause of action." Ans. at 11:6-9.

This is not an affirmative defense—it is a contention that Plaintiffs have failed to state a cognizable claim. *See Zivkovic*, 302 F.3d at 1088 ("that [a] plaintiff has not met its burden of proof as to an element plaintiff is required to prove is not an affirmative defense"). As discussed, in reference to the "First Affirmative Defense," above, this contention is properly advanced through a motion to dismiss—not as an affirmative defense. *See Elvig*, 375 F.3d at 954.

Even if this were a proper defense, it is not supported by facts that would place Plaintiffs on "fair notice." What facts support *how* and *why* the statute does not provide a "private right of action"? Plaintiffs are left to "gamble on interpreting an insufficient defense in the manner [Defendants] intended." *CTF Development*, 2009 U.S. Dist. LEXIS 99538 at *23.

Therefore, this affirmative defense should be stricken, with prejudice.

11. Eleventh Affirmative Defense: Denial of Class Allegations

Defendants' Joint Answer asserts the following affirmative defense: "AS AND FOR AN ELEVENTH SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE to the complaint herein, and each claim for relief thereof, defendants allege that plaintiffs are not representative of any particular class or classes; that plaintiffs' claims represent particularized damages such that class action status is inappropriate, and therefore plaintiffs lack standing to sue on behalf of unnamed class members." Ans. at 11:10-14.

Again, this is not an affirmative defense—it is a denial that Plaintiffs can adequately prove or maintain this matter as a class action, as they have alleged in their Second Amended Complaint. *See Zivkovic*, 302 F.3d at 1088 ("that [a] plaintiff has not met its burden of proof as to an element plaintiff is required to prove is not an affirmative defense"); *see also Miller v. Fuhu Inc.*, 2014 U.S. Dist. LEXIS 134107, *4 (C.D. Cal. Sept. 22, 2014) ("the Court finds that the following are not affirmative defenses, and are more appropriately addressed on a motion for class certification: unconstitutional as class action; not competent plaintiff; no class action; adequacy or typicality requirements not met; numerosity requirement not met; common questions of law and fact do not predominate; superiority requirement not met; lack of typicality; lack of manageability…") (internal citations omitted).

Furthermore, even if this were a proper defense, it is nothing more than a redundant assertion that Plaintiffs cannot certify this matter as a class action. *See* Ans. at 5:20-6:9 (generally and specifically denying Plaintiffs' class allegations). "[N]eedless repetition of other averments" in a pleading constitutes "[r]edundant matter" subject to being stricken. *Sliger*, 789 F. Supp. 2d at 1216. "[Defendants] already denied [Plaintiffs'] allegations," therefore, "[t]his defense is redundant and unnecessary." *Roe*, 289 F.R.D. at 610; *see also Barnes*, 718 F. Supp. 2d at 1174 ("To the extent that the [defendant] restates negative defenses that exist in other parts of the [pleading], those defenses are redundant pursuant to Rule

12(f) and should be struck so as to simplify and streamline the litigation.").

> In [their] answer, [Defendants] repeatedly den[y] that class certification is warranted. The [] affirmative defense is thus duplicative of [Defendants'] answer. It is also clear that class certification is best addressed in the context of a motion that [Defendants] will be able to oppose regardless of the presence of its single-sentence class certification affirmative defense.

Sanchez v. Roka Akor Chicago, LLC, 2015 U.S. Dist. LEXIS 19482, *8 (N.D. Ill. Jan. 9, 2015).

Therefore, this affirmative defense should be stricken, with prejudice.

12. Reservation of the Right to Assert "Additional Affirmative Defenses"

Defendants' Joint Answer asserts the following: "Defendants reserve the right to include any additional affirmative defenses upon the discovery of facts sufficient to support said defenses, and/or dependent upon the outcome of pending petitions under W & I Code section 827." Ans. at 11:15-17.

"A 'reservation of affirmative defenses' is not an affirmative defense." *EEOC v. Timeless Investments, Inc.*, 734 F. Supp. 2d 1035, 1055 (E.D. Cal. 2010); *see also Comercializadora Recmaq*, 2014 U.S. Dist. LEXIS 99692 at **49-50; *EEOC v. NCL America, Inc.*, 536 F. Supp. 2d 1216, 1226 (D. Haw. 2008).

If Defendants intend to assert a subsequently-discovered affirmative defense, they may file a motion to amend their answer, pursuant to the applicable Rules. Defendants are not entitled to "reserve the right" to assert "additional affirmative defenses," beyond what is permitted by the Rules.

> [I]f a defendant must omit an affirmative defense for lack of the necessary factual support, it may do so secure in the knowledge that the Ninth Circuit has "liberalized the requirement that affirmative defenses be raised in a defendant's initial pleading." *Rivera v. Anaya*, 726 F.2d 564, 566 (9th Cir. 1984) (citation omitted); *see also Simmons*, 609 F.3d at 1023 (citing *Rivera* for this proposition). If discovery reveals evidence supporting additional affirmative defenses, defendants may freely seek leave from the court to amend their answers.

Dodson v. Strategic Restaurant Acquisition Co. II, LLC, 289 F.R.D. 595, 602 (E.D. Cal. 2013).

Therefore, this affirmative defense should be stricken, with prejudice.

D. PLAINTIFFS ARE PREJUDICED BY DEFENDANTS' ASSERTION OF INSUFFICIENT AND INAPPLICABLE AFFIRMATIVE DEFENSES IN RESPONSE TO THE SECOND AMENDED COMPLAINT.

"A showing of prejudice is not required to strike an 'insufficient' portion of the pleading as opposed to 'redundant, immaterial, impertinent, or scandalous matter' under Rule 12(f)." *Bottoni v. Sallie Mae, Inc.*, 2011 U.S. Dist. LEXIS 93634, *4 (N.D. Cal. Aug. 22, 2011) (citing *Barnes*, 718 F. Supp. 2d at 1172). "[I]n any event, the obligation to conduct expensive and potentially unnecessary and irrelevant discovery is a prejudice." *Id.*; *see also Dodson*, 289 F.R.D. at 602 ("If a defendant cannot articulate the reasons that affirmative defenses apply to a dispute, it is costly, wasteful, and unnecessary to force plaintiffs to conduct discovery into those defenses."); *California Department of Toxic Substances Control v. ALCO Pacific, Inc.*, 217 F. Supp. 2d 1028, 1033 (C.D. Cal. 2002) ("The possibility that issues will be unnecessarily complicated or that superfluous pleadings will cause the trier of fact to draw 'unwarranted' inferences at trial is the type of prejudice that is sufficient to support the granting of a motion to strike."). Defendants' filing of inapplicable and insufficient affirmative defenses serves no practical purpose in this litigation.

IV. CONCLUSION

This Court should not be forced to expend its scarce judicial resources for the purpose of acting as a "hall monitor for obviously deficient pleadings" asserting boilerplate affirmative defenses.

> The Court notes that Defendants did little more than provide a formulaic recitation of the elements of the majority of the affirmative defenses presented. In addition, many of the affirmative defenses pled by the Defendants are entirely inapplicable to this case. This is legal work unbecoming of an officer of this court . . . This Court should not be put to the burden of being the hall monitor for obviously deficient pleadings.

Mayfield v. County of Merced, 2015 U.S. Dist. LEXIS 22760, *14 (E.D. Cal. Feb. 24, 2015).

For all of the reasons stated, Plaintiffs respectfully request that this Court strike the inapplicable and insufficiently pled affirmative defenses contained in Defendants' Joint Answer to the Second Amended Complaint.

Dated: February 9, 2016

Respectfully Submitted,

By: ______________________________

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[PROPOSED] ORDER

Pursuant to Federal Rules of Civil Procedure 8(b) and 12(f)(2), the Court hereby GRANTS Plaintiffs Myrah Martinez, Kitara McCray, Madison Marlene Marvel, and R.M.'s motion to strike the improperly asserted and deficiently pled affirmative defenses contained in Defendants County of Sonoma, Sonoma County Human Services Department, Jerry Dunn, Sonoma County Family, Youth and Children's Services, Nick Honey, and Stacie Kabour's Joint Answer to the Second Amended Complaint.

Dated:

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JON S. TIGAR
United States District Judge